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476888—58

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 214

GEORGE MASTROS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the Court of Appeals (Pet. App. A) is not yet reported. The opinion of the District Court denying petitioner's motion for a judgment of acquittal, or in the alternative for a new trial, appears at R. 333–343.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1958 (Pet. App. A). The petition for a writ of certiorari was filed on July 24, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

[1] "R." refers to petitioner's appendix in the Court of Appeals. Also filed with this Court are the trial exhibits and the trial transcript.

QUESTIONS PRESENTED

1. Whether a settlement proposal for moneys due on termination of a government contract which set forth the cost figures on which final payment would be fixed is a "claim upon or against the United States" under 18 U. S. C. 287.

2. Whether the evidence supports the verdict.

3. Whether there were trial errors which should now be noted, despite failure to object thereto below.

STATUTE INVOLVED

18 U. S. C. 287 provides:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial held in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on count one of a two-count indictment, which charged that petitioner submitted to the Department of Army a settlement proposal dated July 31, 1953, on behalf of the Espey Manufacturing Company, Inc., "knowing such claim to be false, fictitious and fraudulent * * *" in viola-

tion of 18 U. S. C. 287 (R. 2).[2] Petitioner was sentenced to thirty days' imprisonment and fined $500.00. Execution of the prison sentence was suspended, and petitioner was placed on probation for two years (R. 343). The judgment was unanimously affirmed by the Court of Appeals (Pet. App. A).

The pertinent evidence may be summarized as follows:

1. On June 16, 1950, the Signal Corps of the United States Army awarded Espey Manufacturing Company a two million dollar contract for the production of electronic communication equipment for use in Army tanks (Gov. Ex. 1; R. 3–5). This contract was carried on the books of the corporation as "Job Number 381" (R. 5, 7–8, 47–48). On February 25, 1952, Espey submitted a hardship claim, as authorized by law, asserting that it would incur losses under the contract (Gov. Ex. 2, R. 6). In its supporting schedule, it estimated that, from the inception of the contract until December 31, 1951, it had incurred manufacturing costs of $26,000, including $919.50 for engineering labor (R. 47–49). After hearings, the Army Contract Adjustment Board granted a $600,000 increase in the contract price (Gov. Ex. 4, R. 7–8, 31). Petitioner, who had been hired as controller of the corporation in July 1952, attended the hearings but took no part in the discussion (R. 228, 239).

[2] The second count, charging the making of a false statement in violation of 18 U. S. C. 1001, was dismissed by the district judge at the close of the testimony (R. 2, 312–313, 326).

On January 12, 1953, Espey submitted an invoice for reimbursement of costs incurred pursuant to a progress payment provision in the contract, as modified, providing that the company could be reimbursed with 90% of its direct labor costs. The attached schedule showed direct labor costs (including engineering labor) from the inception of the contract until December 31, 1952, to be $3,882.02 (R. 9–12). The schedule contained a certificate executed by petitioner that the statement of costs was "just and correct" (R. 9).

In March 1953, Louis L. Weiss, an employee of the General Accounting Office, visited Espey for the purpose of reviewing its hardship claims (H. 64–65). He requested from petitioner the papers relating to Job Number 381. After some discussion with petitioner, the firm's accountant, and the firm's attorney, he was given in early April, with apparent "reluctance", two records relating to Job Number 381 (R. 67). These revealed that from the inception of the contract until March 31, 1953, engineering labor costs were carried at $2,314.00, production labor at $2,328.00 (R. 68). He was told that the corporation was processing a termination claim (R. 66) and that there was about $75,000 worth of additional labor not included in the hardship figures. He was shown no supporting documents to support this claim (R. 69–70).

2. The Signal Corps had terminated the contract in February 1953 for the convenience of the Government (R. 39, 113). Thereafter Espey submitted three termination settlement proposals, with covering letters signed by petitioner (Gov. Exs. 6–8, R. 12–14).

The figures were stated to be based on actual costs (R. 18). Settlement proposal No. 3, which was charged to contain the false claim, was broken down as follows (R. 20):

Material	$9,098.86
Labor	80,096.84
Overhead	92,810.04

Although the company records apparently supported it, the labor cost of $80,000 seemed excessive to the auditor investigating the proposal (R. 77–79). Consequently, the auditor decided to compare the original hardship claim with the settlement proposal (R. 79). This comparison revealed that, while engineering labor was a little over $919 in the hardship claim from the start of the contract until December 31, 1951 (see *supra*, p. 3) for the same period, the termination proposal contained an amount of over $72,000 for engineering labor (R. 114). The additional amount was taken from a buildup of engineering charges under a designation No. 381E, which was not contained in the hardship claim (R. 79, 81–82). This was the only contract for which an auxiliary job number was set up (R. 116). When the corporate books had been examined in connection with the hardship claim in March 1952, there was no account No. 381E on the books (R. 49).

3. A special agent for the FBI, who was assigned to the case in late October 1953 (R. 157), had three conversations with petitioner. Petitioner also executed a sworn statement (R. 157). Petitioner admitted that he had caused the transfer of $77,000 of engineering labor from forty-seven other jobs to this particular contract, and allocated this amount to an

account designated 381E (R. 157–158). He had instructed three cost clerks working at Espey to make transfers from the labor charged to these other jobs so that the amount of engineering labor charged to Job Number 381 would amount to 2%–3% of the value of the contract (R. 158). These transfers were started in March 1953, and were made for the period August 1950 through May 1952. He did not inform the clerks which contracts to make the transfers from, nor did he know from which contracts sums were actually transferred until after he had compiled an analysis at the agent's request (R. 158–159). To effectuate these changes, the time cards were modified, by erasing the original job numbers and charging time worked to 381, under the designation of 381E (R. 159, 168). Petitioner said he had not used a journal entry system to make these changes, although it would have saved a great amount of time, because he had not thought of it (R. 160). These transfers were made from contracts, some of which were still open, without first determining whether the labor cost had been properly charged to these contracts in the first instance (R. 161–162, 169). Petitioner gave as his reasons for these transactions his belief, based on former experience, that the $2,314 figure for engineering labor was too low and that 2%–3% of the sales value of a contract of this type would more truly reflect engineering labor (R. 158, 166–167), and from what he had heard at the hearing on the hardship claim in 1952 as to engineering labor expense (R. 188).

Petitioner indicated he had not reviewed this contract. In the agent's opinion, it was difficult to understand how any arbitrary percentage could reflect labor costs without knowing the type of contract involved (R. 167). The agent also testified that a change of the labor cost by altering the time cards, instead of making journal entries, concealed from the Air Force auditors the basis upon which engineering labor was computed (R. 178).

Petitioner, when he took the stand, admitted that the agent's résumé as to what petitioner had said was substantially correct (R. 254). He himself testified that, while 2% of the contract price as engineering labor was, in his opinion, a "reasonable assumption", it was not based on any factual paper work, nor on any intensive discussion with the engineers as to the actual engineering cost incurred on Job Number 381 (R. 276–277, 269).

4. Some time after the FBI was brought into the case, on February 16, 1954, Espey submitted a revised proposal, setting forth only $2,314.92 for direct engineering labor (R. 138, 140). On cross-examination of a government auditor, petitioner brought out the fact that, even with the engineering costs reduced, the total claim was more than that in the proposal on which the indictment was based. The auditor stated that there was a reason for the difference (R. 140).

ARGUMENT

1. Petitioner contends (Pet. 20–21) that the settlement proposal on which the indictment was based is not a "claim upon or against the United States"

within the purview of 18 U. S. C. 287 because it was an interim proposal subject to revision upward or downward. This argument misconstrues the function of the settlement proposal.

The regulations in effect when the proposed settlement was submitted provided for the filing of a settlement proposal "setting forth *the amount claimed to be due* by reason of the termination." 32 C. F. R. 8.503–1 (Emphasis added). Any ultimate payment would have to include reimbursement for actual costs. The settlement proposal was therefore not merely a basis for discussion; it was a claim for money due as of right. The fact that the rights claimed might be subject to challenge as inaccurate does not alter the fact that money was being demanded from the United States. The proposal was thus a "claim upon or against the United States" within the meaning of 18 U. S. C. 287. *United States* v. *Cohn*, 270 U. S. 339, 345–346. See also *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 543–544; *Rainwater* v. *United States*, 356 U. S. 590; *United States* v. *McNinch*, 356 U. S. 595.

Petitioner attempts to find support for his position in the fact that the language "for payment or approval" contained in the pre-1948 provision was omitted from 18 U. S. C. 287, thus evincing—he urges—a Congressional purpose to excise from statutory coverage a claim subject to revision. This novel argument has no merit. On petitioner's logic, if a false claim made for "approval" is not a crime under 18 U. S. C. 287, a false claim for "payment" would also be outside the statute, since both words were

omitted from the 1948 revision. A claim by its nature must be for approval or payment. The omission of the two words was not designed to work a substantive change, but to eliminate redundancy. This is confirmed by the revisor's notes that "Minor changes in phraseology were made."[3]

2. The attack on the sufficiency of the evidence is without merit. Petitioner argues that, although the prosecution proved that he "unconventionally reconstructed" direct engineering costs in the third settlement proposal, there was no evidence to show what the true engineering costs were (Pet. 17–20). But the Government had to prove only that the claim was false—not the exact amount of the falsity. The evidence established that, in a radical departure from existing records and contrary to prior statements as to labor costs, petitioner as controller of the firm, for the purposes of the termination proposal, modified the time cards so that an additional $77,000 not shown in the hardship claim was reflected as engineering labor costs incurred under the contract. This was done by arbitrarily reducing sums from other contracts and allocating them to a special fund designated 381E. This transfer was not based upon reexamination of the actual costs incurred under the contract, nor upon a determination of whether the changes incorrectly reduced actual engineering costs originally allocated to

[3] Section 287 derives from 18 U. S. C. 80 (1940 ed.). By the 1948 revision, Section 80 was divided into two parts: (1) the portion making it a crime to submit false claims became present Section 287, and (2) the part relating to false statements became 18 U. S. C. 1001. H. Rep. No. 304, 80th Cong., 1st Sess., p. A 25.

other jobs on a direct cost basis. The item of $80,000 for labor costs was thus, by petitioner's own admissions of how he reconstructed that item, not a statement of the actual labor costs, as it purported to be. The claim which included this item as one on which reimbursement was due was therefore false.

The judge did not, as petitioner claims, foreclose petitioner from showing that the reconstruction was proper on the basis of actual costs.[4] In refusing to permit Alfred S. Kuhn, general manager of one of Espey's subcontractors, to testify as to his personal opinion as to whether the change in costs were proper, the judge held that Kuhn had not been shown to be intimate with the work performed under the contract or qualified to pass judgment on the costs actually incurred (R. 211–212, 216). The trial judge further pointed out that petitioner was in no way foreclosed from calling engineers who had worked on the contract to support his cost analysis. Petitioner did not call any of the engineers.

Petitioner also argues that the evidence was insufficient to establish a false claim because there was evidence that the ultimate proposal, filed after that here involved, was for a higher total amount, even though the claim as to the engineering labor costs was reduced

[4] The excerpts from the colloquy between the trial judge and defense counsel (R. 305–307), relied on by petitioner for his claim that the jury never dealt with the issue of falsity (Pet. 14–16), occurred out of the presence of the jury on petitioner's motion for a judgment of acquittal (R. 305–307). Read in totality, it is clear that the charge itself left that issue with the jury. (See R. 313–327, particularly at 316, 319–320; compare the opinion of the District Court at R. 340–342.)

by approximately $77,000. The fact remains, however, that the claim presented did contain a claim for reimbursement of an excessive amount for labor costs. As of the date is was presented, for what it purported to cover, the claim was false.[5] The fact that a subsequent proposal may have been higher because of the legitimate increase in other items does not affect the falsity of the claim that was presented at the time it was presented.

3. Lastly, petitioner contends that his conviction should be reversed because of alleged trial errors. As he admits (Pet. 24), these alleged errors were not raised below, and in any event none warrants relief under Rule 52 (b) of the Federal Rules of Criminal Procedure.

a. Petitioner's contention that the trial judge erroneously instructed the jury that his reconstruction of engineering costs constituted, in itself, the making of a false claim (Pet. 21) has already been dealt with and shown to be without merit. See *supra*, pp. 9–10.

b. Similarly unfounded is petitioner's claim (Pet. 21–22) of prejudicial error in that the trial judge refused to charge as requested that a "wrongful purpose is an essential element of the offense." Although the trial judge may not have charged in the specific language requested, he made clear that a wrongful

[5] The regulations provide (32 C. F. R. 8. 503–1 (b)) that, with the consent of the contracting officer, "proposals may be filed in successive steps covering separate portions of a claim. If such interim proposals are submitted, they should include all costs of a particular type, except as the Contracting Officer may authorize otherwise."

purpose was an essential element of the offense. He charged (R. 323):

> I have defined "wilful" to you as used in a criminal statute. It means an act done with a bad purpose, an evil motive, an evil mind. An innocent mind, a mind clear and fresh, without any ulterior motive, would not devise a scheme; it must come from an evil mind; it must be motivated by a bad purpose, and that is a rather complex psychological factor that you will have to evaluate.

(See also R. 319, 320–321, 322.)

c. Petitioner further argues that he was prejudiced by remarks made by the United States Attorney to the jury in rebuttal, relating to the part played in these transactions by the Pinsleys, the owners of Espey Corporation. The rebuttal of the United States Attorney is the only portion of the closing statements of either counsel which was transcribed and hence the only portion made part of the record. Although the statement is thus shorn from context, it is evident that the United States Attorney was answering statements made by defense counsel, and was thus entitled to wide leeway in response. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 241, 242; *Brennan* v. *United States*, 240 F. 2d 253, 264 (C. A. 8), certiorari denied, 353 U. S. 931; *United States* v. *Doyle*, 234 F. 2d 788, 796 (C. A. 7), certiorari denied, 352 U. S. 893; cf. *Lawn* v. *United States*, 355 U. S. 339, 359–360, n. 15.

In any event, by specifically charging the jury to disregard these remarks of the United States Attor-

ney relating to the Pinsleys, the trial judge protected petitioner from any possible prejudice. *Az Din* v. *United States*, 232 F. 2d 283, 285 (C. A. 9), certiorari denied, 352 U. S. 827; *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 637 (C. A. 2), certiorari denied, 329 U. S. 742.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari should be denied.

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